No. 80-1148

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

JACQUELYN M. CHAGNON, ET AL., PETITIONERS

*v.*

GRIFFIN BELL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the Attorney General and officials of the Federal Bureau of Investigation acting at his direction were correctly granted summary judgment on grounds of qualified immunity with respect to a claim of personal damages liability arising from the authorization and conduct of a national-security wiretap of a foreign agent.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not yet reported. The opinion of the district court (Pet. App. 37a-49a) is reported at 468 F. Supp. 927.

### JURISDICTION

The judgment of the court of appeals was entered on August 14, 1980 (Pet. App. 36a). On November 6, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 12, 1980, and on December 3, 1980, the Chief Justice granted a further extention to and including January 11, 1981. The petition for a writ of certiorari was filed on January 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In a complaint filed on April 11, 1978, petitioners alleged that their conversations with one Truong Dinh

Hung (who is not a party to this litigation) were incidentally overheard in the course of a national-security wiretap that had been conducted on the home telephone of Truong, who was a foreign agent engaged in espionage against the United States. Petitioners sought monetary and equitable relief under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Named as defendants in their individual and official capacities were Attorney General Griffin B. Bell, former FBI Director Clarence M. Kelley, Associate FBI Director and former Acting FBI Director Richard Held, and FBI Special Agent William Fleshman, Jr. (Pet. App. 2a, 5a-6a).

In early May 1977, Attorney General Bell was advised by FBI Director Kelley and Deputy Secretary of State Warren Christopher that there had occurred a serious breach of security involving the unauthorized disclosure of classified State Department documents to representatives of a hostile foreign government. The Attorney General was further informed that Truong Dinh Hung, who was known not to be a citizen of the United States, had been the focus of a joint FBI-CIA counterintelligence investigation directed at suspected agents of the Socialist Republic of Vietnam (SRV). On a number of recent occasions, during the time of the 1977 Paris negotiations between the SRV and the United States, Truong had used an undercover FBI-CIA courier to deliver packages to, and to bring back materials from, North Vietnamese representatives in Paris, France. In addition, federal agents had found classified State Department documents in a package that Truong sent to Paris. By May 6, 1977, the FBI was convinced that Truong was an SRV intelligence agent. Officials of the Department of State considered the compromise of classified documents to be "a very grave problem" (Pet. App. 7a) and expressed their concern that these breaches of security could prejudice the relations of the United States with foreign countries and

could identify and endanger individuals who were supplying information to the United States (*id.* at 6a-7a; *United States* v. *Truong Dinh Hung*, 629 F. 2d 908, 911 (4th Cir. 1980)).

On the basis of these reports, Attorney General Bell concluded that Truong was part of a network of SRV agents. In addition, the Attorney General found that "[i]t was imperative * * * to determine the extent of the material already compromised, the source of the materials within this Government, the identity and scope of Truong's intelligence network, and the extent of this network's activities" (Pet. App. 7a). Accordingly, acting pursuant to a written delegation of authority from the President, the Attorney General authorized a wiretap of Truong's telephone on May 9, 1977 (*id.* at 7a, 21a, 22a).

In line with the Attorney General's established practice concerning counterintelligence investigations, no judicial warrant was sought for the Truong wiretap. The decision to proceed with the warrantless surveillance was based on the Attorney General's conclusion that a court order was not required where, as here, it was believed that the subject of the surveillance was an agent of a foreign power and the purpose of the surveillance was to protect national-security information from foreign intelligence activities and to obtain foreign intelligence information, including counterintelligence information, deemed essential to the security of the United States (Pet. App. 7a, 8a; C.A. App. 25).[1]

The wiretap of Truong's telephone commenced on May 11, 1977. In August and November of 1977, the Attorney General authorized 90-day extensions of the wiretap. The surveillance continued until January 31, 1978, when, as a

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[1]Petitioners acknowledge that the wiretap was initiated and conducted in full accordance with applicable Executive Orders and Department of Justice guidelines (Pet. App. 24a n.23, 25a n.25).

result of the foreign intelligence investigation, an indictment charging espionage and other offenses was returned in the Eastern District of Virginia against Truong and Ronald Humphrey, an official of the United States Information Agency (Pet. App. 8a).[2]

2. In the district court, respondents moved to dismiss or, in the alternative, for summary judgment. This motion was supported by the direct and cross-examination testimony of Attorney General Bell at the suppression hearing in the criminal case, his affidavit in that case, and the opinion denying the motion to suppress (Pet. App. 10a-12a).[3]

Finding that there were "no genuine issues of material fact" (Pet. App. 38a), the district court granted respondents'

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[2]Prior to their trial, Truong and Humphrey moved to suppress all evidence obtained as a result of the Truong wiretap. Among the witnesses at the evidentiary hearing on the motion to suppress was Attorney General Bell, who testified as to the reasons, purposes, and authority for the electronic surveillance. The district court held that the warrantless wiretap had been justified under the "foreign agent" exception to the warrant requirement of the Fourth Amendment because the wiretap had been approved by the Attorney General pursuant to authority delegated to him by the President, had been directed against an agent of a foreign power, and had been undertaken for purposes of foreign intelligence or counterintelligence. The court also concluded that the wiretap had been conducted in a reasonable manner between its inception and July 20, 1977. However, the court found that a warrant was required by July 20 because the primary focus of the surveillance had shifted from counterintelligence to criminal prosecution. Based on that finding, and without considering the reasonableness of the way in which the combined counterintelligence-prosecutorial wiretap was conducted after July 20, the court ordered the suppression of evidence obtained from the wiretap subsequent to July 20, 1977. See *United States* v. *Humphrey*, 456 F. Supp. 51, 55-60 (E.D. Va. 1978). On the defendants' appeal from their convictions on espionage and other charges, the court of appeals affirmed the district court's ruling on the legality of the wiretap. See *United States* v. *Truong Dinh Hung*, *supra*, at 912-917.

[3]Respondents also sought a protective order to stay discovery pending resolution of their motion for summary judgment. The district court granted this stay of discovery (Pet. App. 11a)..

motion for summary judgment (*id.* at 42a-47a, 50a). Noting the "[a]bsen[ce of] a good faith allegation by [petitioners] that the Attorney General or those acting under his authority were motivated by malice toward Truong Dinh Hung" (*id.* at 43a), the court concluded that the wiretap "was not in violation of any 'clearly established' constitutional or statutory right" (*id.* at 45a) and therefore that respondents were entitled to qualified official immunity.[4]

3. The court of appeals unanimously affirmed (Pet. App. 1a-35a). It found that "[w]hether evaluated by reference to Supreme Court and other judicial precedent, to presidential practice, or to then existing congressional legislation, the state of the law with respect to electronic surveillance of foreign agents of foreign powers was, at best, unsettled in 1977-1978, the period of the Truong wiretap" (*id.* at 17a). Thus, the court rejected petitioners' contention that the surveillance was objectively unreasonable because it was improperly initiated, because it was impermissibly continued after the primary purpose had become prosecutorial, and because it was inadequately minimized (*id.* at 23a-26a).[5]

In addition, the court of appeals found that petitioners had raised "no actual claim that the Attorney General acted with malicious motivations" (Pet. App. 29a) and that "even granting all inferences and resolving all disputes in the [petitioners'] favor, no reasonable person could infer that the Attorney General had acted with malicious intent" (*id.*

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[4]Because it granted respondents' motion for summary judgment based on qualified immunity, the district court found it unnecessary to decide either the legality of the wiretap in this case (Pet. App. 42a) or the availability of an absolute-immunity defense (*id.* at 43a n.4).

[5]Like the district court, the court of appeals did not decide, but simply assumed for purposes of its decision, that the Truong wiretap was in fact unlawful (Pet. App. 13a, 15a, 23a, 26a, 28a).

at 30a).[6] On this basis, the court concluded that summary judgment was appropriate because petitioners' asserted issues of disputed fact involved merely "claim[s] of mistake—that the Attorney General 'knew or should have known' of the illegality of the Truong wiretap" (*id.* at 29a)—which, in the absence of malice and in light of the unsettled nature of the law at the time (*id.* at 17a), failed "to raise an issue material to the immunity question" (*id.* at 26a).[7]

## ARGUMENT

1. Petitioners principally contend (Pet. i) that respondents should have known that the Truong wiretap violated the warrant and minimization requirements of the Fourth Amendment and that the courts below erred in concluding that the law was not "clearly established" in these areas in 1977-1978. These issues, which involve only the determination of the state of the law at a prior time, do not merit this Court's review. Furthermore, in the future, issues regarding warrants and minimization in foreign national-security wiretaps will be governed by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. (Supp. II) 1801 *et seq.*, which was adopted after the termination of the Truong surveillance. As the court of appeals observed (Pet. App. 5a):

> [A] number of the matters at issue here are specifically addressed in the Foreign Intelligence Surveillance Act of 1978, * * * which Congress enacted after the events

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[6]The court also determined that respondents "have demonstrated in the record, without contradiction, that their actions were taken in good faith" (Pet. App. 30a n.27) and that they had met any burden imposed on them by Fed. R. Civ. P. 56(c) " 'to show initially the absence of a genuine issue concerning any material fact,' granting all favorable inferences to the party opposing the motion" (Pet. App. 31a-32a).

[7]Likewise, since petitioners' discovery requests related only to issues that "were immaterial to the immunity questions" (Pet. App. 34a), the court of appeals sustained the district court's stay of discovery (*ibid.*).

> giving rise to this litigation. It is therefore unlikely that a case of this nature, involving the precise issues here raised, will arise again at any time in the near future.

Hence, the petition should be denied because it presents no issue of continuing legal significance.[8]

2. In addition, petitioners fundamentally misapprehend the nature of the decision in this case. Contrary to suggestions throughout the petition (*e.g.*, Pet. 9, 10, 12-13), the court of appeals did not resolve the Fourth Amendment requirements for warrants and minimization in foreign intelligence wiretaps. Rather, it held that, even assuming in petitioners' favor that the Truong wiretap was unlawful (see note 5, *supra*), the surveillance in 1977-1978 "violated no clearly established constitutional right" (Pet. App. 5a). Therefore, the case presents no substantive constitutional questions for consideration by this Court.

3. At all events, the court of appeals, in a lengthy opinion upon which we rely, correctly upheld the district court's grant of summary judgment to respondents on the ground of qualified immunity. Moreover, the decision below does not conflict with any decision of this Court or the other courts of appeals. Accordingly, further review is unwarranted.[9]

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[8]Petitioners suggest (Pet. 7, 10-11) that the decision below somehow will undermine the provisions of the Foreign Intelligence Surveillance Act. This suggestion is unfounded. The Act unquestionably is inapplicable to this litigation, and the court of appeals expressly noted (Pet. App. 35a) that "[w]hether or not the acts complained of here might be subject to different treatment under the Foreign Intelligence Surveillance Act is a matter that need not occupy us in this case." There will be time enough in the future to consider the requirements of the Act in a case, unlike this one, that arises under the statute.

[9]We note that petitioners have not challenged the court of appeals' holding (Pet. App. 10a-11a n.9) that the FBI officials sued in this case are entitled to derivative immunity based on the official immunity of the Attorney General.

a. The court of appeals correctly held that the allegedly inadequate minimization in the Truong wiretap did not constitute a violation of clearly established law (Pet. App. 25a-29a). As we discuss in the Brief for Petitioners at 52-55, 58, *Kissinger* v. *Halperin*, No. 79-880 (argued Dec. 8, 1980),[10] no settled Fourth Amendment requirement for minimization of national-security surveillance has been developed, and certainly none existed during the period May 1977-January 1978 when the Truong wiretap was conducted. See also *Sinclair* v. *Kliendienst*, No. 79-2010 (D.C. Cir. Mar. 9, 1981), slip op. 3-4, 9. Indeed, no court had specifically addressed the standard for minimization applicable to national-security wiretaps until the district court in 1978 considered this very wiretap in the related criminal prosecution of Truong and Humphrey (see page 4 & note 2, *supra*).[11] The absence of clearly established law was particularly evident for the kind of wiretap involved in this case—a foreign national-security wiretap of a foreign citizen acting as an agent of a hostile government.[12]

For these reasons, the court of appeals correctly concluded that the minimization requirement for foreign

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[10]Counsel for petitioners in the instant case also represent the respondents in *Kissinger* v. *Halperin*.

[11]We also note that the minimization standard applicable to wiretaps in traditional criminal investigations—which is a more stringent standard than that applicable to national-security wiretaps (see *United States* v. *United States District Court*, 407 U.S. 297, 322-323 (1972))—was substantially clarified by this Court in *Scott* v. *United States*, 436 U.S. 128 (1978). In *Scott*, no effort was made to minimize the interception of telephone calls (*id.* at 133-134), but the Court concluded that the surveillance could nonetheless be reasonable in light of such factors as, in the present case, the extensiveness of the targeted activity and the use of a private rather than a public telephone (*id.* at 140).

[12]None of the cases relied on by petitioners (Pet. 8-9) involved a foreign intelligence surveillance of a foreign agent who was not a United States citizen.

national-security surveillance was not clearly established at the time of respondents' acts.

b. Petitioners next contend (Pet. 11-13) that respondents should have known that the Fourth Amendment required a warrant both for the initiation of the wiretap when the primary purpose of the surveillance concededly was to obtain foreign intelligence, and for the continuation of the wiretap when and if the prosecutorial purpose of the surveillance began to predominate over the counterintelligence purpose. However, as set out in the Brief for Petitioners at 55-59, *Kissinger* v. *Halperin, supra*, this Court in *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), and *United States* v. *United States District Court*, 407 U.S. 297, 308-309, 321-322 (1972), had expressly left open the question of a warrant requirement for foreign national-security surveillance, and several courts of appeals had held that a warrant was not required for such surveillance. See aslo *Sinclair* v. *Kliendienst, supra,* slip op. 8-9. And, as the court below recognized (Pet. App. 25a-26a n.25), there was neither a "clearly established" requirement that a warrant be obtained for a wiretap that had the "parallel" purposes (*id.* at 9a) of counterintelligence and prosecution nor a "clearly established" standard for determining what in fact was the primary purpose of the surveillance.[13]

Petitioners argue (Pet. 12-13) that a warrant requirement was established for all wiretaps, including foreign intelligence wiretaps of foreign agents, by the plurality opinion in *Zweibon* v. *Mitchell*, 516 F. 2d 594, 651 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*). However, *Zweibon I* "hold[s] * * * only that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration

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[13]In addition, the record shows that at all times the Truong wiretap was part of a foreign security investigation that never lost its counterintelligence purpose. See, *e.g.*, Pet. App. 8a, 9a, 22a, 31a, 44a.

with a foreign power * * * "(516 F. 2d at 614; see also *id.* at 651). Furthermore, the court of appeals in this case concluded (Pet. App. 18a-20a) that its earlier decision in *Zweibon I* did not "clearly establish" a warrant requirement for foreign security surveillance or put respondents on notice that the Truong wiretap was unlawful. At most, then, the asserted conflict between the decision below and *Zweibon I* is in the nature of an intra-circuit conflict that does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

c. There is also no merit to petitioners' final claim (Pet. 13-15) that summary judgment was improperly granted to respondents on the ground of qualified immunity. This narrow issue, which was resolved against petitioners by both courts below, does not justify further review.

In any event, the court of appeals correctly sustained summary judgment in this case. In light of the unsettled state of the law on foreign national-security wiretaps, and in the absence of an "actual claim that the Attorney General acted with malicious motivations" (Pet. App. 29a; see also *id.* at 43a), there were no genuine issues of material fact with respect to respondents' qualified immunity defense. Even now, petitioners have identified only two issues, both involving allegations of recklessness, that in their view served to preclude the grant of summary judgment (Pet. 15). However, because the law was not clearly established and respondents' actions were objectively reasonable, these assertions that respondents " 'knew or should have known' " that the Truong wiretap was unlawful (Pet. App. 29a) do not raise a disputed question of fact relevant to the motion for summary judgment based on qualified immunity.

Summary judgment in this case comported with the Court's admonition in *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), that claims against federal officials for damages "can be terminated on a properly supported motion for summary judgment based on the defense of

immunity. * * * [F]irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." Here, respondents' motion for summary judgment was supported by "detailed and non-conclusory" submissions (Pet. App. 31a) consisting of the Attorney General's affidavit and testimony in the related criminal case and the district court's opinion denying the defendants' motion to suppress in that case. The record presented "an essentially uncontested picture of a high-level federal official required to act outside the zone of safely settled constitutional doctrine in a matter he viewed as posing an urgent threat to national security" (*ibid.*). In these circumstances, qualified immunity for respondents was appropriate to ensure that "[f]ederal officials * * * not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law" (*Butz* v. *Economou, supra,* 438 U.S. at 507), and "to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman,* 444 U.S. 193, 204 (1979).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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